No. 12,284

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CECELIA J. WILSON,

Appellant,

vs.

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, a corporation,

Appellee.

Reply Brief of Appellant

On appeal from the United States District Court for the District of Idaho, Eastern Division

HONORABLE CHASE A. CLARK, *Judge*

B. W. DAVIS,
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SUBJECT INDEX

Page

Summary 1

Points and Authorities:

I. 5-6

II. 6-7

III. 7

IV. 7

Argument ..... 8 to 15 Inc.

Analysis of Appellant's Brief ..... 15 to 20 Inc.

Appendix ..... 21 to 26 Inc.

TABLE OF AUTHORITIES CITED

CASES

Pages

W. H. Barber Co. v. Hughes, 63 N.E. 2d. 417 18

Browning v. Equitable Life Ass. Society (Ut.)
80 P. 2d. 348 6-8-11-20

Ballam v. Metropolitan Life Ins. Co. 3 N.E.
2d. 1012, (Mass) 6

Browning v. Equitable Life Assurance Society, (Ut.)
72 Pac. 2d. 1060 8

Clayton v. Metropolitan Life Ins. Co. (Ut.)
85 P. 2d. 820 6-11-14

Conn. Mutual Life Ins. v. Union Trust Co. 112 U.S.
250-251, 5 Sp. Ct. 119, 28 L. Ed. 708 7

Catherine Ware Nielsen v. Gen. Am. Life Ins. Co.
89 Fed. 2d. 90 7

Compania Atlantica Centro-American S.A. v. Alliance
Assurance Co. Ltd. et al, 50 Fed. Supp. 986 7

Caldwell v. Travelers Ins. Co. 267 S.W. 907 17

C.I.T. Corp. v. Sanderson, 43 Fed. 2d. 985 18

Equitable Life Assurance Society of the U.S. v
Peltus, 40 U.S. 227-234, Sp. Ct. Reporter,
226-234, 35 L. Ed. 140 7

Griffin v. Prudential Ins. Co. of Am. (Ut.)
133 P. 2d. 333 6

Hassing v. Mutual Life Ins. Co. of N. Y. (Ut.)
159 P. 2d. 117 6

Happoldt v. Guardian Life Ins. Co. of Am. (Cal.)
203 P. 2d 55 7-14

Handley v. Mutual Life Ins. Co. of N. Y. (Ut.)
147 P. 2d. 319 8

Kentucky Life & Acc. Ins. Co. v. Harper
19 S.W. 2d. 973 6-12

Lee v. New York Life Ins. Co. (Ut.)
82 P. 2d. 178 6

Mason v. Life & Cas. Ins. Co. (Tenn)
41 So. 2d. 153 7

Metropolitan Cas. Ins. Co. of N. Y. v. Fairchild
220 S.W. 2d. 803 7

McAllister v. State of Alabama, 181 So. 511 7

Meiers & Frank Co. v. Bruce (Ida.) 30 Ida. 732 18

National Acc. & Health Ins. Co. v. Childs,
9 S.E. 2d. 108 (Ga.) 6-10-23-24

New York Life Ins. Co. v. Wilson, Case
No. 12227, (C.C.A.) 2-6-8-15

Order of Railway Conductors of Am. v. Gregory,
91 S.W. 2d. 1139 6

O'Meara v. New York Life Ins. Co. (Mo.)
169 S.W. 2d. 116 16

Provident Life & Acc. Ins. Co. v. Simms (Tex.)
149 S.W. 2d. 281 5-10-22

Preston v. Aetna Life Ins. Co. 174 Fed. 2d. 10 7-14

Poole v. Imperial Mut. Life & Health Ins. Co.
(N.C.) 125 S.E. 8 7

Pritchard, Ex. v. Norton, 106 U.S.
124-141, 27 L. Ed. 104 7

Pope v. Business Mens Ass. Co. (Mo.)
113 S.W. 2d. 887 16-17

Prudential Ins. Co. of Am. v. Carlson 126 Fed. 607 19

Railway Mail Ass. v. Babbitt 160 Fed. 2d. 314 6

Rauert v. Loyal Protective Ins. Co. (Ida.)
106 P. 2d. 1015 6

Reynolds v. National Casualty Co. 101 S.W. 2d. 515 20

Shain v. Mutual Benefit Health & Accident Ass. Co.,
(Ia.) 7 N.W. 2d. 806 5-9-21

Sheinman & Sons Inc. v. Scranton Life Ins. Co. (Pa.)
39 Fed. Sup. 398 7

Squire v. Eubanks, 294 N.W. 166 19

Travelers Ins. Co. of Hartford v. Murray,
16 Colo. 296, 26 P. 774 6-12

U.S. Fid. & Guar. Co. v. Blum (9th Cir.)
270 Fed. 946 7

Wheeler v. Fidelity & Casualty Co. 251 S.W. 924 16

Young v. New York Life Ins. Co. (Mo.)
221 S.W. 2d. 843 6

TEXTS

Pages

108 A.L.R. 1 - Note 31 6

Appendix "A." Shain v. Mut. Benefit Health &
Accident Ins. Co. 7 N.W. 2d. 806 21

Appendix "B." Provident Life & Acc. Ins. Co. v.
Simms, 149 S.W. 2d. 281 22

Appendix "C." National Acc. & Health Ins. Co. v.
Childs, 9 S. E. 2d. 108 23-24

Appendix "D." Testimony of Dr. Call 24-25-26

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SUMMARY

The instant case, if it presents any question for determination, presents only the question of whether or not the language found under the heading of General Provisions in the first paragraph thereof on the last page of the policy in question, to the effect that certain things are to be construed as sickness, precludes appellant from recovery by reason of such language. This statement can now be safely made by reason of this court's decision in New York Life Insurance Co. v. Wilson No. 12227, heretofore decided by this court on November 21, 1949. In that case the appellate court has held that the beneficiary established death by accident within

the general insuring clause of the policy and that the death did not result directly or indirectly from *infirmity of* mind *or body, illness or disease,* or from any bacterial infection.

And it is appellant's contention that sickness and disease, being synonymous, that the case decided is conclusive.

The present policy, that is the policy of Business Men's Assurance Co. is an accident policy insuring against death, accident, covering loss of limbs, sight and time and is less restrictive in the general insurance clause than the policy of the New York Life Insurance Company. The general insurance clause found on page one of the present policy is as follows:

> "Hereby insures Harry H. Wilson against loss resulting directly and independently of all other causes from bodily injuries sustained during any term of this policy and affected solely through accidental means." * * *

Article One under the heading INDEMNITY FOR SPECIFIC LOSSES provides:

> "Article 1. If such injuries independently of all other causes result within ninety days from date of accident in any one of the losses enumerated in this Article, the Company will pay in lieu of all other indemnities provided herein indemnity set opposite such loss and in addition thereto monthly indemnity as provided in Article 11 to the date of such loss.

FOR LOSS OF

LIFE THE SINGLE DEATH INDEMNITY

There then follows in the policy Articles 2 to 10, providing for the different indemnities for surgical benefits, optional cash payments etc. Then follows: STANDARD

PROVISIONS — There are 17 Provisions in number Among the Standard Provisions is No. 8 which provides:

> "* * * and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law."

Then follow the *General Provisions* of the Policy, there being five in number.

It will be observed that the General Provisions found on the last page of the policy are not under any heading of limitations or conditions and that the limitations and conditions are found generally under the Standard Provisions of the Policy.

The beneficiary has clearly established her case and the right to recover under the insuring clause found on the first page of the policy, which is an accident policy providing for payment not only in case of death, but providing for payment for medical treatment and for loss of time in case of accident. And in the General Provisions of the Policy as quoted herein, it is attempted to define medical or surgical treatment as sickness, and this is directly contrary and in conflict with the general insuring clause and places the burden upon the defendant of proving death by sickness or disease, which are synonymous, and immediately creates in the policy an ambiguity, which must, under the Idaho law, be construed favorably to the beneficiary.

We make this statement unqualifiedly by reason of both the fact and the law, that if an insured, by accidental means, receives an injury that causes a hernia and resulting death, that

the insuring clause would clearly, under the authorities we cite, entitle the beneficiary to recover and that the conditions or limitations under the General Provisions that provide that hernia is sickness, creates an ambiguity and that the courts will not so construe the same as sickness if the proximate cause of the death was an accident within the meaning of the policy.

The question before the court is still the same, namely, Was the death of the deceased caused:

> "Wholly or partly or the result of which are contributed to, by bodily or mental infirmity, hernia, ptomaines, bacterial infections, or by any disease."

Both the trial court and the appellate court have held that hernia was not the cause of the death and both courts have held that death was not caused directly or indirectly from bodily or mental infirmity or disease.

In fact, it was never seriously contended at the trial of the cause, that death was the result of sickness or disease and evidence was not introduced upon that theory by appellee and the case of Rauert v. Loyal Protective Insurance Co. (Ida.) 106 Pac. 2d. 1015 is squarely in point on this phase of the case. The only testimony on this phase of the matter is that of Dr. Brothers who testified:

> "Q. And everyone of those go back to a bodily infirmity?
>
> A. Injuries and prior operations you would not call them diseases."

It is clear then, by reason of the recent decision referred to and by reason of the holding of the trial court, that Harry H. Wilson did not meet his death by reason of,

"or by any disease or medical or surgical treatment therefor," so the medical or surgical treatment not having been

given for a disease, as clearly there is no contention that hernia is a disease, this exclusion does not in any way affect appellant's rights and the final wording:

> "such hernia * * *, disease or medical, or surgical treatment to be construed as sickness"

is not an exclusion or a limitation at all, but is merely explanatory, and surgical or medical treatment, not having been given for disease, the statement by the company that disease is to be construed as sickness or that medical or surgical treat ment therefor is to be construed as sickness, adds nothing whatever to the policy because as stated, sickness and disease are synonymous and because the policy of the New York Life Insurance Company in New York Life Insurance Company v. Wilson, also provided that there could be no recovery if death resulted

> " * * directly or indirectly from infirmity of mind or body, from illness or *disease.*"

POINTS AND AUTHORITIES

I.

Where accident policy insured against loss of life, limb, sight or time resulting directly from accidental means, subsequent provisions of the policy under what are deemed General Provisions attempting to limit the general insuring clause and providing that hernia shall be construed as sickness, creates an ambiguity in the policy which must be construed in favor of the insured. (Policies with apparent identical language have been so construed)

> Shain v. Mutual Benefit Health & Accident Assurance Co. (Ia.) 7 N.W. 2d 806;
> Provident Life & Accident Insurance Co. v. Simms, (Tex.) 149 S.W. 2d, 281;

National Accident and Health Insurance Co. v. Childs (Ga.) 9 S.E. 2d, 108;
Browning v. Equitable Life Assurance Society (Utah) 80 Pac. 2d. 348;
Railway Mail Association v. Babbitt, 160 Fed. 2d. 314;
Order of Railway Conductors of America v. Gregory, 91 S.W. 2d. 1139;
Travelers Ins. Co. of Hartford v. Murray, 16 Colo. 296, 26, Pac. 774;
Kentucky Life & Accident Ins. Co. v. Harper, 19 S.W. 2d. 973.

II.

The appellate court having held in New York Life Insurance Co. v. Wilson, Case No. 12227, that the beneficiary, under identical medical testimony, has brought herself within the liability under the insurance clause, she is entitled to recover, the defendant not having established that death was due to sickness.

Rauert v. Loyal Protective Insurance Co. (Ida.) 106 Pac. 2d. 1015;
Clayton v. Metropolitan Life Insurance Co. (Utah) 85 Pac. 2d. 820;
Ballam v. Metropolitan Life Ins. Co. 3 N.E. 2d. 1012 (Mass.) 108 A.L.R. 1 (See note on Page 31);
Browning v. Equitable Life Assurance Society, supra;
Griffin v. Prudential Insurance Co. of America, (Utah) 133 Pac. 2d. 333;
Lee v. New York Life Insurance Co. (Utah) 82 Pac. 2d. 178;
Hassing v. Mutual Life Insurance Co. of New York (Utah) 159, Pac. 2d. 117;
Young v. New York Life Insurance Co. (Mo.) 221 S.W. 2d. 843;

Metropolitan Casualty Ins. Co. of N. Y. v. Fairchild, 220 S.W. 2d. 803;
Mason v. Life & Casualty Ins. Co. v. Tennessee, 41 So. 2d. 153;
Preston v. Aetna Life Ins. Co. 174 Fed. 2d. 10;
Happoldt v. Guardian Life Ins. Co. of Am. (Calif.) 203 Pac. 2d. 55.

III.

The terms "sickness and disease" are synonymous and imply a substantial illness or malady which has a general bearing on the health of the insured.

Conn. Mutual Life Insurance v. Union Trust Co. 112 U.S. 250-251, 5 Sp. Ct. 119, 28 L. Ed. 708;
Sheinman & Sons Inc. v. Scranton Life Insurance Co. (Pa.) 39 Fed. Supp, 398;
U. S. Fidelity & Guaranty Co. v. Blum (9th Cir.) 270 Fed. 946;
McAllister v. State of Alabama, 181 So. 511;
Poole v. Imperial Mutual Life & Health Insurance Co. (N.C.) 125 S.E. 8;
Browning v. Equitable Life Assurance Society, supra.

IV.

The law of the State where the contract is to be enforced governs.

Pritchard Ex. v. Norton, 106 U.S. 124-141, 27 L. Ed. 104;
Equitable Life Assurance Society of the U. S.v. Benjamin F. Peltus, 40 U.S. 227-234, Sp. Ct. Reporter, 226-234, 35 L. Ed. 140;
Catherine Ware Nielsen v. General American Life Insurance Co. 89 Fed. 2d. 90;
Compania Atlantica Centro-American S.A. v. Alliance Assurance Co. Ltd. et al. 50 Fed. Supp. 986.

ARGUMENT

We will first discuss the only provisions of the death and accident policy before the court that as we understand it, could possibly now affect the decision in this case and that were set out and construed by the learned trial Judge as precluding recovery by the plaintiff.

We believe it is certainly fair and reasonable to state and assume that had the decisions that are herein called to this court's attention, been called to the attention of the trial court, that his decision would have been otherwise in this particular case.

However, it must be readily apparent to this court from the transcript and from the medical testimony that the instant case was presented to the trial court by counsel on both sides upon the same identical theory that it was presented to this court in the case of New York Life Insurance Co. v. Wilson, supra.

There is called to the court's attention, authorities clearly indicating that the language in the exclusion provisions of the policy with reference to medical or surgical treatment or sickness or disease is not controlling in a case of this kind at all, and that they either refer to the medical or surgical treatment for sickness or disease that is not caused by accident or that if they do not so refer, that the policy is ambiguous and not in conformity with the general insuring clause and that the ambiguity, must, of course, be construed favorably to the insured.

The case of Handley v. Mutual Life Insurance Co. of New York (Utah) 147 Pac. 2d. 319, not only re-affirms Browning vs. Equitable Life Assurance Society, 72 Pac. 2d.

1060 and 80 Pac. 2d. 348, but is so nearly on all fours with the present case insofar as the facts are concerned, as to be very unusual in that respect. This is a hernia case where the insured died, either from pulmonary thrombus or pulmonary embolism and the policy contained among other things, a provision that there must be due proof

> "that the insured died as a direct result of bodily injury, affected solely through external, violent, and accidental means, independently and exclusively of all other causes, and of which * * * there is evidence by a visible contusion or wound on the exterior of the body, and that such death occurred (a) within ninety days after the date of such injury. * * *

The provisions of the policy providing that the death must have been by accidental means independently and exclusively of all other causes would exclude sickness, disease, bodily infirmity or any other independent cause. We call attention to the fact that there was an autopsy in this particular case and as heretofore suggested, the facts are more nearly identical than is usually found to be the case in briefing a matter of this kind.

The following cases seem to contain the identical language of the instant policy insofar as the question before the court is concerned, but regardless of wheter they are identical the principle of law is exactly the same and it will be observed that they are in point on the construction of the terms of the policy.

In Shain vs. Mutual Benefit Health and Accident Assurance Co. (Ia.) 7 N.W. 2d. 806, the court held that a policy referring to sickness was ambiguous and in its opinion said:

> "It is our opinion that on account of the statements made in the insuring clause, the provisions as

> to specific losses in Part "A," and the restrictive clauses in Part "K" that there is an ambiguity in the contract now before us and that, in the interpretation, it should be construed most favorably to the insured. The statement made by Justice Oliver in New York Life Ins. Co. v. Rotman, supra, is quite applicable in this case. It was there stated at Page 604 of 3 N.W. 2d. as follows:
>
> ' * * * The test to be applied by the court in determining this issue is not what the insurer intended its words to mean, but what a reasonably prudent person applying for insurance of this type would have understood them to mean.' "

To show that the terms of the policy being considered by the court in this case are similar, we quote further from the opinion as follows: See Appendix "A"

In Provident Life & Accident Insurance Co. v. Simms, (Tex.) 149 S.W. 2d. 281, the court had before it an accident policy and the question was on the construction of the policy where a hernia was involved.

The question was over the construction of the insurance clause, part one, part three and part fifteen. The same are quoted: See Appendix "B"

In the case of National Accident & Health Insurance Co. v. Childs (Ga.) 9 S.E. 2d. 108, the court had before it, the construction of a policy where there was a provision that certain things should be considered arising out of sickness and disease and that they were covered only under and subject to the illness provisions of the policy. The provisions in that part of the policy attempting to exclude certain injuries or illness were in the disjunctive, using the word *or* the same as the exclusions in the instant policy. The court in determining that matter said: See Appendix "C."

It does not require further citations to show the liberal rule of construction in favor of the insured adopted by the Idaho Supreme Court or the fact that Idaho has definitely placed itself on record with those courts allowing recoveries in cases of this kind.

The case of Browning vs. Equitable Life Assurance Society (Utah) 80 Pac. 2d. 348 which has been cited and quoted from in appellant's original brief, holds without question that in a policy, the terms identical to those here, that sickness or disease mean a sickness or disease of such a character that would result in death independently of the accident.

A perusal of the Utah cases cited in this Reply Brief show the continual re-affirmance of the Browning case and in addition the continued citation of that case by the Idaho Supreme Court makes the Browning case and the other Utah cases just as much the law of the State of Idaho as the O'Neill case or any other Idaho case cited.

In Clayton v. Metropolitan Life Insurance Co. (Utah), 85 Pac. 2d. 821, the court had before it a policy which excluded death caused wholly or partly, directly or indirectly by disease or medical or surgical treatment therefor. The insuring clause in that policy is the same as the insuring clause here and the holding is directly in favor of the plaintiff.

The exclusions relied on by appellee as defeating recovery refer to

"All bodily injuries, fatal or otherwise."

These exclusions are not referring merely to death and it is clear that the reference to medical or surgical treatment as "sickness" is also for the purpose of relieving the company of

being obliged to pay for an operation for hernia or any disease or sickness not caused by accident.

If one paraphrases the language of the court in Travelers Insurance Co. of Hartford v. Murray, 16 Colo. 296, 26 Pac. 774, the decision is immediately found applicable here. This language is in the second column on Page 776 of the Pacific Reporter. The policy there ~~contended~~ CONTAINED a provision with refrence to medical and surgical treatment and we paraphrase the language from the opinion:

> "We cannot adopt the construction of the exception in the contract of insurance so ably urged. The hernia *embolism* must be regarded as the result of the accident that caused the death; the cause of the death; the force of the blow received *violent choking and coughing;* the consequent injury arising from the concussion *choking and coughing* and the hernia *embolism* resulting. Deceased was insured against the accident by the terms of the body of the policy."

It can well be argued as the law that the exclusion relied upon in the policy applies only to non-fatal accidents.

> Kentucky Life & Accident Insce. Co. v. Harper, 19 S.W. 2d. 973

But the rule of law laid down in this case is conclusive that appellant's analysis of the policy is correct and that at least the exclusion clause would be ambiguous when construed in connection with the insuring clause.

As pointed out, this policy covered and provided for payments for exceptions that did not result in death. As showing the ambiguity in this policy and the inconsistencies between the general insuring clause and the general provisions under which we find the exclusions, attention is called to Article X under the schedule of operations on the opposite side of the

sheet containing the Standard Provisions. Under this article is given a schedule of Operations and the amount that will be allowed and the very first provision is:

"Abdomen—cutting into Abdominal Cavity for diagnosis or treatment of organs therein, $200.00"

Certainly this is medical or surgical treatment and if the appellee's construction of this policy is correct, then one who receives a blow by accident that results in a hernia and is given a surgical or medical treatment for that hernia and who dies, cannot under any circumstances recover, through his beneficiary, by reason of the fact that the surgical and medical treatment are sickness and that this is not a sickness policy, and there could not even be a recovery of the $200.00

How can it be contended that the insuring clause and this provision are clear and unambigiuous and how can it be contended that to set these conditions out in such clear and unmistakable terms in the insuring clause, and to then provide that even treatment for a hernia caused by accident is sickness, does not render the policy ambiguous and what business man, though trained in general business and in examining the ordinary contract, would ever look upon or understand this policy to limit the right of recovery for accident in any such a manner.

Any other construction means that one who suffers an accidental injury that excites a hernia or gall bladder, does not dare to have surgical help, for no matter what accident befell him, his medical aid makes his case one of sickness.

We have not found a case where the courts have in any way based their decision upon the explanatory phrase that Medical Treatment or Surgery were sickness, even though the

policies contain the same provision as the one before the court and this clearly means and can only mean that the Medical Treatment referred to is the Medical Treatment for the thing that caused his death not that Medical Treatment for the hernia makes a death by accident for another reason, sickness. Here it may be said that the embolism caused the death and that the embolism resulted from or was brought about by a previous dormant thrombus. The Medical Treatment was not for the thrombus at all, but for the hernia operation and he did not die of the hernia operation, and here is where the trial court fell into error.

The Insured certainly did not receive any Medical Treatment for a pre-existing thrombus and he certainly did not receive any Medical Treatment for the pulmonary embolism that unfortunately resulted in his death.

While the case on its merits has been determined insofar as the proof that death was due to accident within the meaning of the insuring clause of the policy, we, neverthless, feel that the case of Clayton v. Metropolitan Life Insurance Co., supra, and the Missouri case of Young v. New York Life Insurance Co. 221 S. W. 2d. 843, and Happoldt v. Guardian Life Insurance Co. of America, 203 Pac. 2d. 55, as well as Preston v. Aetna Life Insurance Co. 174 Fed. 2d. 10 are especially applicable and if the matter is further considered, will be of assistance to the court. The case of Happoldt v. Guardian Life Insurance Co. of America is in point on the merits and is exactly what the Idaho Courts hold and have held. The case of Preston v. Aetna Life Insurance Co. is where the Circuit Court reversed a trial court in an accident case and this case is also in point on the question of what law governs here and the

duty of the Circuit Courts since the decision in the case of Erie v. Tompkins.

It is always quite easy to pick out certain answers of a witness when he is thoroughly examined and cross-examined, that make it appear that his testimony is contraditory, or that it supports a particular view. But any fair evaluation of Dr. Call's testimony shows conclusively that his theory in answering these questions and in making these answers could not be claimed to bring the case within the rule of law contended for by appellee and in support of this statement, we respectfully call to the attention of the court, Dr. Call's explanation to the trial judge as to what was a contributing cause: See Appendix "D".

It is very clear what Dr. Call meant and the value of his explanation and testimony in this respect is that it was elicited by the court.

ANALYSIS OF APPELLEE'S BRIEF

That portion of the appellee's brief devoted to the merits of the cause and arguing and citing authorites to the effect that the death was due directly or indirectly or contributed to by bodily infirmity or disease, has been decided adversely to appellee in New York Life Insurance Co. v. Wilson.

And it is of no particular benefit to appelle to argue that the trial court's decision, through wrong, insofar as his construction of the exclusions of the policy is concerned, will nevertheless be upheld if any theory of the evidence will support it.

Appellant does not argue and could not argue that had the case of New York Life Insurance Co. v. Wilson been re-

versed and not affirmed, that appellant could even have proceeded in this case and it was for precisely this reason that appellant, with the consent of counsel for the appellee, requested the court that counsel be not required to file a reply brief until the first case was determined and the appellee must now rely upon the construction given by the trial court to the exclusions in the policy to uphold the trial court's decision.

The appellee seeks to argue that the law of Missouri is controlling in the instant case and that it can raise that question without any cross-appeal.

We do not really feel that it is very material as to what can or cannot be raised by appellee without a cross-appeal. We take no exception to the cases cited by appellee from the U. S. Supreme Court, but they certainly go no further than to hold that the court's decision upon the facts, even though made upon a misconception of the facts or an erroneous construction of them, will nevertheless be upheld if there are facts sufficient to uphold the decision upon any other theory.

We do, however, contend that this rule does not go so far as to permit the appellee here, after a direct finding against it, that the law of the State of Idaho governs, to raise the question that the law of the State of Missouri is applicable when that question is not before the court on appeal at all, unless properly raised by the appellee under a cross-appeal.

However, we fail to see how the application of the Missouri law would aid appellee in view of the holding of the Missouri court in Wheeler v. Fidelity & Casualty Co., 251 S. W. 924 and the decision of the Missouri case of O'Meara v. New York Life Insurance Co. 169 S.W. 2d 116 where a hernia was involved. Appellee relies upon Pope v. Business

Men's Assurance Co., 131 S.W. 2d. 887, and Caldwell v. Travelers Insurance Co., 267 S.W. 907, both Missouri cases. All that Pope v. Business Men's Assurance Co. does is affirm and uphold Caldwell v. Travelers Insurance Co., and this case is not in point. It lays down a rule of law in Syllabus 1 that is in accord with the holding of the trial judge here and is directly in point in appellant's favor. In addition, this opinion reviews all of the Missouri decisions in similar cases previously decided and on Page 921 of the decision, names the Missouri cases that are in conflict and that will not be followed. It is very significant that the Supreme Court of Missouri did not in any way over rule Wheeler v. Fidelity & Casualty Co., supra, but says:

> "All other cases from this court and the court of Appeals are clearly distinguishable on the facts"

and thereby directly approves it and similar cases.

We have scanned the policy carefully. There is no provision that we can find stating that it takes effect only when signed and approved in the State of Missouri or that it is to be a Missouri contract. It is well known that these policies are stamped with a facsimile of the officers' signatures and that the policies are simply filled out and delivered after the application is received.

The appellee in its brief on page 33 says:

> "The last act to make the policy effective was the acceptance by the insurance company of Mr. Wilson's application and the premium and the signing of the policy. This was done in Kansas City. The policy was probably mailed from the home office in Kansas City, but it was effective nevertheless even before it was mailed."

These are all suppositions. The policy does not support them and this policy certainly would not become effective

until Mr. Wilson had received it. It could not very well have been a binding contract until such time.

The policy did not provide that it was a Missouri contract or that it took effect only when signed or approved in Missouri for the simple reason that the laws of many of the States are much more favorable to the insurance companies in cases of this kind than the law in Missouri. The State of Missouri certainly cannot be listed as one of the States directly opposed to the Idaho theory. In many of the cases found on this subject, the courts will observe that the inusrance companies that are Missouri corporations contend that the law of the State where the policy is held and where it is to be performed, are controlling.

Appellee under IX of its Points & Authorities cite four cases in support of its contention that the policy is to be governed by the laws of the State of Missouri.

The first case cited, Meiers & Frank Co. v. Bruce, 30 Ida. 732 is clearly not in point. The Idaho Supreme Court had before it a contract signed in Oregon, payable in Oregon and where all of the parties at the time the contract was signed, resided in Oregon.

In C.I.T. Corpn. v. Sanderson, 43 Fed. 2d. 985, an Idaho case in the Federal District Court, is not in point on the facts or even similar and the court in that case laid down the rule:

> "That the last act to be done to complete the contract governs as to the law."

W. W. Barber Co. vs. Hughes, 63 N.E. 2d. 417, was a suit on a note and the holding was that it became effective in Illinois and that the contract is made where the last act takes effect. This case is not even similer.

Squire v. Eubanks, 294 N. W. 166—is a case where there was a suit on a note given to the bank who made a loan in another State.

Appellee cites only one case involving an insurance Policy. That is Prudential Insurance Co. of America v. Carlson, 10th Circuit, 126 Fed. 2d 607. In that case the policy provided that it was not to take effect until signed at the home office and the plaintiff alleged that it was a New Jersey contract and this was admitted in the answer.

We submit that not one of these cases is in point as to the facts and that they are not authority for overcoming the court's findings and decision that the Idaho law governs.

In this connection we call the court's attention to the testimony of Walter M. Jones, the agent for the company, called by the plaintiff as a witness. He testified that he was the branch manager of the appellee, who had come from Salt Lake City to represent the Appellee. T 121. He also testified:

> "Q. What is your business?
> A. Branch Manager for the Business Men's Assurance Company for the branch serving the States of Utah and part of Idaho.
> Q. And Pocatello is in your jurisdiction?
> A. Yes sir."

T121.

He had also been in Salt Lake City since 1923 for the company. It is clear that the company was doing business in Idaho as a foreign corporation and that it had accepted the laws and the constitution of the State of Idaho.

Wilson's contract was to be performed in Idaho.

However, the burden was upon the appellee to prove that

it was a Missouri contract and subject to the laws of Missouri and this was pleaded.

The appellee had it in its power to prove the fact how the policy was delivered, whether by mail or agent. The beneficiary did not have this burden and the appellee pleaded it.

As we have heretofore shown and as has been called to the court's attention by quotation from the Browning case, on re-hearing, in our opening brief, the policy before the court provided:

> "That disease, when used in this policy means sickness." (Page 24 of Appellant's original brief.)

Under the heading Argument 11 commencing on Page 22 of Appellee's brief, will be found the argument of appellee in support of its theory that the policy is not ambiguous and that the trial court did not err, but there is no anlaysis of similar provisions of policies, just a bald statement, that it is not ambiguous.

The appellee argues that because of the amount of the premium paid that there should not be a recovery. That question was raised in the former case and as bearing upon it, we cite the following:

> Reynolds v. National Casualty Co., 101 S.W. 2d. 515

It is respectfully submitted that the judgment should be reversed.

B. W. DAVIS
Attorney for Appellant
Residence: Pocatello, Idaho.

APPENDIX "A"

"The section of the policy termed the 'Insuring Clause! is as follows: 'Insuring Clause: Charles E. Shain (herein called the Insured) of City of Bronson, State of Iowa, against loss of life, limb, sight, or time, resulting directly and independently of all other causes from bodily injuries sustained through purely Accidental Means (Suicide, sane or insane, is not covered), and against loss of time on account of disease contracted during the term of this Policy, respectively, subject, however, to all the provisions and limitations hereinafter contained.'

"The essential portion of Part "A", pertaining to accident indemnities is as follows: 'If the Insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuously and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, the Association will pay: * * ** .'

"Part "K" which relates to the insurance coverage as to sickness is as follows:

'All diseases are covered by this Policy.'

"'Any accidental injury, fatal or otherwise, resulting in hernia, boils, carbuncles, felons, abscesses, ulcers, infection, septiacaemia, ptomaine poisoning, cancer, diabetes fits, peritonitis, apoplexy, sunstroke, freezing, hydrophobia, sprained or lame back, shall be paid for as provided in Part H or I anything to the contrary notwithstanding'

"Part "H" referred to in Part "K", supra, relates to illness indemnity payments for confinement as the result of disease, and Part "I" relates to illness indemnities for sickness that are nonconfining. The demurrer of the plaintiff to defendant's answer contends that it does not constitute a defense to plaintiff's cause of action; that the insured received a bodily injury caused solely by accidental means, which said accident caused a hernia, and that the insured died as a direct result of the injury sustained by him; that where a policy, in a specific clause, provides for benefits by clear and comprehensive language against death from bodily injury caused by accidental means, liability for such death will not be destroyed by language of the exceptions unless such exceptions are clear and free from reasonable doubt."

APPENDIX "B"

"The Insuring Clause.

"Against — (1) The effects resulting directly and exclusively of all other causes, from Bodily Injury sustained during the life of this policy solely through external, violent and accidental means of which there are external marks on the body of the Insured, hereinafter called 'such injury'; * * *

"Part 1.

"Section (a)—The Monthly Indemnity for accident or Sickness, is *Forty* ($40.00) * * *

"Part 3. Monthly Accident Indemnity

"Sec. (a) If 'such injury' shall from the date of the accident totally, solely, and continuously disable and prevent the

Insured from performing each and every duty pertaining to any business or occupation, the Company will pay monthly indemnity, for such period of total disability (not exceeding twelve consecutive months) at the rate specified in Section (a) of Part 1. * * *

"Part 15. Not Covered

"This policy does not cover suicide or any attempt thereat, same or insane, or hernia (except that in the event of disability or loss resulting from hernia or operation therefor, the company will pay the monthly indemnity provided in Part 1 for the period of such disability, not exceeding fourteen days)."

The court in determining the matter favorably to the insured, held:

"But appellant contends that Part 15 limited appellee's coverage for hernia to fourteen days; Part 15 expressly so provides. Thus, we have a direct conflict between the coverage provided by Parts 1 and 3 and the coverage provided by Part 15. Part 15 does not fall within the 'conditions and limitations' provided for in the first paragraph of the policy, but is a withdrawal of hernia from the coverage at the rate of $40 per month. This conflict creates an uncertainty and ambiguity in the construction of the policy, and invokes the following rule: * * * "

APPENDIX "C"

"It is contended by the company that, since the evidence in this case shows that there were no contusions on the body

of the insured, and no outward signs on his body of the injury sustained, under the provisions of the policy the disability would be construed to arise because of sickness and not be paid for as an accident. We are unable to agree with this contention. It is true that there were no signs on the body of the insured of the accident, yet it does not follow that under the terms of the policy the disability arose because of sickness. Counsel for the plaintiff in error have misconstrued paragraph E of the policy. This paragraph does not say that in the absence of any cut or contusion the disability shall be deemed to arise because of illness, but says that injuries, fatal or non-fatal, which do not produce immediate total or partial disability or which do not produce a visible contusion, etc. An injury which produced immediate total disability would not be deemed disability arising because of sickness. Nor would disability arise where there was a visible contusion or cut. These two types of injuries are connected in the policy with the disjuctive or. An injury under either of the two classifications would be covered by provision A of the policy. If the policy intended to provide that every injury which did not produce a visible contusion, wound or cut should be considered as illness rather than accident, it would have been meaningless and absurd to have referred in the policy to an injury which produced immediate disability."

APPENDIX "D"

"The Court: I would like to have the doctor reconcile this answer, or rather the answer to the question previously asked with the answer to Mr. Merrill's question. He answered

Mr. Merrill's question that it was (61) a contributing cause.

A. We always have a contributing cause.

The Court: Regardless of any death certificate, doctor, you answered Mr. Merrill's question in which you said that the operation was the contributing cause of his death. Now, you may reconcile that answer with the answer to Mr. Davis that this was an accident within the definition given in the dictionary.

A. I think maybe I could do better if I may use an illustration?

The Court: Certainly, that is all right.

A. If you were riding in a car and the car was being driven over a road where there was a large chuck-hole unforseen by the driver—the driver hits the chuck-hole and throws the car over and one is killed, the driving of the car is the contributing cause, just as the hernia is the contributing cause here.

Q. How would the hernia be the contributing cause?

A. Well, you might say, it takes the patient away from his normal way of living.

Q. It is your opinion that the man would not have died without an operation for hernia?

A. That is right.

Q. And with reference to driving the car and hitting the chuck-hole, the snoring and breathing is that comparable to the chuck-hole? (62)

A. That's right.

Q. Then you testify that if the man had not had the hernia this choking would not have occurred and that the hernia is not the cause, or did not cause death?

Mr. Merrill: Objected to as argumentative and leading.

The Court: It is, but that is the question we are trying to get at here.

A. In putting that question to me, the answer is again, that the snoring is comparable to the chuck-hole in the road.

Q. Dr. Call, you have made answers here that would indicate, if you understood the way counsel was asking the question, that the hernia operation caused the death. Now, as I understand it, the fact that he was there— is that what you mean doctor, the fact that he was in the hospital for an operation put him in the position for the other thing to happen and that the other thing caused his death?

A. That's right.

Q. And that is your studied opinion?

A. Yes sir.